Non-Criminal Grounds of Removability: Advanced Survey and Recent Topics

2018 Executive Office for Immigration Review Legal Training Program

Presentation Plan

- Alienage
- Suppression Standard
- Permissible Evidence Post Suppression
- Non-Criminal Grounds of Removal
  - Fraud
  - Alien Smuggling
  - Reason to Believe is a Trafficker
  - Public Charge
  - Wrongful Voting
- Questions

Alienage

- Burden remains always on DHS to prove alienage because it is jurisdictional.
- DHS must put forth sufficient evidence of alienage.
- Then, DHS may use testimony to establish removal.
- However, admission of birth abroad proves alienage.
- Rebut presumption by prima facie evidence of U.S. citizenship

Suppression

- Is the rule applicable in proceedings? No right to a separate hearing.
- Was there a search or seizure?
- Is there probable cause (arrest) or a reasonable suspicion (stop)?
- Was it unreasonably prolonged or executed with unreasonable or excessive force?
- Standing to assert constitutional right? Specific, detailed supported motion required.
- Does the 4th Amendment apply? (egregious violation of 4th, liberty; policy/pattern, widespread abuse; affects the probative value/unreliable; transgress fundamental fairness)

Suppression

- Totality of the circumstances (e.g., time, place/border proximity, force, profiling, targeted, free to leave, legal process implicating a right/harm)
- State or federal actor
- Indirect fruit suppressible unless an exception to suppression applies:
  - Obtained from independent source
  - Discovery was inevitable
  - Identity Evidence
  - Sufficiently attenuated events between activity and information

Independent Evidence

- Even if a Constitutional violation is found, the government may be able to prove alienage "using evidence gathered independently of, or sufficiently attenuated from, the original arrest." *INS v. Lopez-Mendoza* (US 1984); *Matter of Cervantes* (BIA 1996).
- Application of exclusionary rule should put government in same position as if no violation but "not in a worse one." Murray v. US (1988).

Identity

- Identity of a person is independent evidence.
- The "'body' or identity of a defendant or respondent … is itself never suppressible as the fruit" of the poisonous tree. *INS v. Lopez-Mendoza* (US 1984).
- Evidence of alienage linked to the respondent through the use of his name may not be suppressed, regardless of the nature of the violation. *US v. Guzman-Bruno* (9th Cir. 1994); *US v. Navarro-Diaz* (6th Cir. 2005); *Navarro-Chalan v. Ashcroft* (1st Cir. 2004).

Evidence Not Linked Through Name

- Questions may arise as to whether the evidence of alienage was obtained solely based on the alien's name, which may require fact-finding.
- For example, the Second Circuit has held that the respondent's birth certificate and arrest records were not admissible because the government had not met its burden to establish that they were obtained only by using his name. *Pretzantzin v. Holder* (2d Cir. 2013).

Identity Related Evidence

- Some circuits have interpreted identity broadly to include identity-related evidence as not being suppressible, such as the A-file contents. *US v. Farias-Gonzales* (11th Cir. 2009); *US v. Guzman-Bruno* (9th Cir. 1994); *US v. Roque-Villanueva* (5th Cir. 1999); *Kandamar v. Gonzales* (1st Cir. 2006); US v. Garcia-Garcia (7th Cir. 2011) (cannot suppress fact that alien was previously deported).
- An alien has no proprietary interest in his immigration file and no reasonable expectation of privacy in it. *US v. Bowley* (3d Cir. 2006).

Identity Related Evidence

- Other circuits say that *Lopez-Mendoza's* reference to identity concerned the court's jurisdiction over the person, so identity-related evidence may be suppressed. *Pretzantzin v. Holder* (2d Cir. 2013); *US v. Oscar-Torres* (4th Cir. 2007).
- Broader reading would give police carte blanche powers to engage in unconstitutional conduct. *US v. Olivares-Rangel* (10th Cir. 2006)
- Evidence suppressed if it is linked to the respondent in a manner tainted by illegal police conduct.

Evidence suppressed if tainted

- I-213 is presumptively reliable and sufficient to prove alienage, absent evidence that it contains information that is incorrect or was obtained by coercion or duress. *Matter of Ponce-Hernandez* (BIA 1999); *Gutierrez-Berdin v. Holder* (7th Cir. 2010).
- I-213's contents about alienage were obtained from the respondent's admission at time of illegal seizure and detention and thus I-213 was suppressed. Sanchez v. Sessions (9th Cir. 2017).
- Factual findings may be needed as to how obtained.

Fingerprints not suppressed

- Some circuits view fingerprints as identity evidence that cannot be suppressed and may be used to link the alien to the A file or other evidence.
- Fingerprints taken to identify the respondent may not be suppressed. *US v. Farias-Gonzalez* (11th Cir. 2009) (name and DOB did not match, so ICE agents took fingerprints with a portable device that showed different name and previous deportation; deterrence benefit did not outweigh social costs).
- Fingerprints taken solely for civil immigration purposes are not suppressed. US v. Oscar-Torres (4th Cir. 2007).

Fingerprints may be tainted

- For some circuits, fingerprints may be suppressed if they were obtained by exploiting the illegality of the unlawful arrest. If the purpose of the illegal arrest was to obtain the fingerprints to link the person to criminal activity, evidence from that cannot be used.
- But fingerprints will not be suppressed if they were taken as part of a routine procedure to identify the person. *US v. Olivares-Rangel* (10th Cir. 2006); *US v. Garcia-Beltran* (9th Cir. 2004); US v. Ortiz-Hernandez (9th Cir. 2005) (second set of fingerprints for booking admissible).

Alien Testimony

- Alienage can be established though testimony that is voluntarily given while in proceedings. *Matter of Barcenas (BIA 1988); Matter of Carrillo* (BIA 1979); *US v. Alderete-Deras* (9th Cir. 1984).
- A statement will be admitted if it "is sufficiently an act of free will to purge the primary taint." US v. Guevara (8th Cir. 2001) (citing Wong Sun v. US (US 1963).
- Admitting the factual allegations in NTA establish removability, even if alien has a pending motion to suppress. *Miguel v. INS* (6th Cir. 2004).

Immigration Court Filings

- Alienage can be established based on representations made in court filings. *Matter of Cervantes-Torres* (BIA 1996) (motion to administratively close); *Matter of Velasquez* (BIA 1986) (motion for change of venue); *Vanegas-Ramirez v. Holder* (2d Cir. 2014).
- If alien or his attorney does not object to admission of documents, they may establish removability. Lopez v. Mendoza (US 1984).
- Evidence submitted in bond proceedings.

Right Against Self Incrimination

- If called to testify, the respondent may invoke a Fifth Amendment privilege against self-incrimination. *Matter of R-* (BIA 1952).
- Alien can refuse to answer whether he entered without inspection, a crime under 8 USC § 1325(a), and the refusal to answer cannot be used against him. *Id.* *But see Matter of Santos* (BIA 1984) (alien cannot refuse to answer whether overstayed visa).
- Immigration Judge is not required to provide *Miranda* warnings. US v. Aldrete-Deras (9th Cir. 1984).

Adverse Inference

- If an alien properly invokes the right against self-incrimination, an adverse inference cannot be made. *Matter of Sandoval* (BIA 1979).
- Otherwise, an adverse inference can be drawn from an alien's silence in removal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Matter of Guevera* (BIA 1991); *Berdin v. Holder* (7th Cir. 2010).
- Some circuits have indicated adverse inference can be made in removal cases even if privilege invoked. *Gutierrez v. Holder* (9th Cir. 2011); *Mireles v. Gonzales* (7th Cir. 2006).

Continuing Violation

- The Supreme Court has recognized the continuing nature of illegal presence, both in the criminal immigration and civil deportation contexts. *See Reno v. American-Arab Anti-Discrimination Committee* (US 1999); *Lopez-Mendoza* (US 1984).
- Once the authorities know who the alien is, courts have recognized that they can be recharged for criminal illegal reentry. *US v. Farias-Gonzalez* (11th Cir. 2009); *US v. Navarro-Diaz* (6th Cir. 2005); Pretzantzin v. Holder (2d Cir. 2013) (not addressing possibility of new NTA).

INA § 212(a)(6)(C)(i): Willful Misrepresentation of a Material Fact

"Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

- The term "material" is not defined in section 212(a)(6)(C)(i) or elsewhere in the Act.

What Constitutes a Material Fact?

"[T]he materiality requirement . . . is satisfied if either (1) the alien is excludable on the true facts or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." Matter of Bosuego, 17 I&N Dec. 125, 128 (BIA 1979; 1980) (considering the definition of material in determining whether an alien was excludable under former INA § 212(a)(19)).

The Government must show that the facts "would have likely been uncovered and considered but for the misrepresentation," and then the burden shifts to the alien "to establish that no proper determination of inadmissibility could have been made." Id. at 131.

What Constitutes a Material Fact? (continued)

The important factor is how the case would have appeared before the consul had he been in possession of all the facts at the time the application was made, if concealment of such facts would have made the alien inadmissible, then such was a material matter. *See* Matter of Avalos Zavala, 11 I&N Dec. 196, 199 (BIA 1965); *see also* Matter of Bosuego, 17 I&N Dec. at 128.

What Constitutes a Material Fact? (continued)

A fact is material if it would make the alien excludable or has a *"natural tendency to influence, or was capable of influencing,"* the decisions of the government agency. Kungys v. United States, 485 U.S. 759, 770 (1988).

- The issue in Kungys was whether a naturalized U.S. citizen should lose his citizenship under INA § 340(a) for making false statements on his visa and naturalization applications.
- The Kungys majority opinion did not further clarify the meaning of the phrase "natural tendency."
- Majority of circuits espoused the "natural tendency" standard in Kungys as a general standard for defining the term "material." However, beyond the "natural tendency" standard there was no consensus in the courts for defining the term "material."
- The Ninth Circuit adopted the "fair inference" test from Justice Brennan's concurrence in Kungys. "[A] presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed." *See* Forbes v. INS, 48 F.3d 439 (9th Cir. 1995).

What Constitutes a Material Fact? (continued)

In Matter of D-R-, 27 I&N Dec. 105 (BIA 2017), the Board exercised its authority to define the term "material" as it applies to INA § 212(a)(6)(C)(i).

- The Board held that Kungys and Matter of Bosuego should be read together and that a statement is material when (1) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's inadmissibility and (2) would have predictably have disclosed other facts relevant to his eligibility for a visa, other documentation, or admission to the United States. Id. at 112-113.
  - The Board declined to follow the "fair inference" test, but held that it applies to whether the alien procured an immigration benefit by the alien's misrepresentation and not as to whether the misrepresentation is "material." Id. at 112.
  - After the DHS meets its burden of proof, the burden shifts to the alien "to establish that no proper determination of inadmissibility could have been made." Matter of Bosuego, 17 I&N Dec. at 131.

Alien Smuggling

Encourage, Induce, Assist, Abet or Aid Any Other Alien to Enter to Try to Enter the U.S. in Violation of Law

INA 237(a)(1)(E)
INA 212(a)(6)(E)(i)

Reason to Believe is a Trafficker

U.S. knows or has reason to believe is a trafficker…or has been a knowing assister, abettor, conspirator, or colluder with others…

INA 212(a)(2)(C)(i)

Public Charge

By reason of poverty, insanity, disease or disability

INA 212(a)(4)

Unlawful Voting

- "Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable." Section 237(a)(6)(D)(A) of the Act.
- Such an alien is also inadmissible. Section 212(a)(10)(D)(i) of the Act.
- Charge is met if the alien (a) voted and (b) did so in violation of any Federal, state, or local law.
- Criminal conviction is not required.

Federal Voting Exception

- Federal statute exception if: (1) the Federal election is held partly for some other purpose, (2) State law or local allow allows aliens to vote for other purposes, and (3) voting is independent of voting for Federal offices so the alien could vote only for the other offices. 18 USC §§ 611(a)(1)-(3).
- In *Matter of Fitzpatrick*, alien did not show that State or local law allowed her to vote for local offices. Ballot from the election included Federal, state, and local offices.

Intent

- Knowing that voting is illegal is not required under Federal law: 18 USC § 611(a) does not require intent. *Matter of Fitzpatrick* (BIA 2015) (alien claimed she did not know her voting was illegal); *Kimani v. Holder* (7th Cir. 2012).
- Intent may be required under State law: In a case involving a Hawaii statute that required specific intent, alien was not removable without showing that alien knew voting was unlawful. *McDonald v. Gonzales* (9th Cir. 2005).

Official Authorization Defense

- "Official authorization" may be a defense to finding a violation of 18 USC § 611(a), if the official was authorized to interpret the requirements for registration and could give binding advice. *Keathley v. Holder* (7th Cir. 2012).
- The alien must make complete and accurate representations to the official. *Fitzpatrick v. Sessions* (7th Cir. 2017) (claimed to be citizen; clerk said voting is "up to you").
- Even if the state official had authorization to register, it does not equate to authority to authorize an alien to vote in Federal election. *Kimani v. Holder* (7th Cir. 2012).

Questions & Closing